IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-939

MESCALERO APACHE TRIBE, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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In its brief, the government raises four points that petitioners believe are appropriate for reply. These are:

1. that the decision below does not conflict in principle with *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (1968) (Govt. Br. 12 n.11);

2. that petitioners' IMPL accounts can properly be analogized to "checking accounts" (Govt. Br. 8 n.4 and 13);

3. that the provisions of section 28 of the Act of May 25, 1918, and of the Act of June 24, 1938, which authorize the investment of Indian trust funds, being in

terms permissive, do not give rise to an obligation to make such funds productive (Govt. Br. 13); and

4. that section 2 of the Act of September 11, 1841, regardless of its plain language, cannot really have been meant to require the investment of "all funds held in trust by the United States," else there would have been no need in subsequent treaties and statutes to have made further provision for the investment of, or the payment of interest on, Indian moneys in the government's possession (Govt. Br. 10).

1. The court below concluded that the government was not obligated to have made petitioners' trust funds productive because to recognize such an obligation, and award damages for its breach, would entail allowing interest on a claim against the United States.

The court below made precisely the same error in *Peoria.* Reversing there, this Court said (390 U.S. at 470-471):

> . . . this is not a case where the Court is asked to exercise "the power to award interest against the United States" . . . The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under the treaty.

Peoria stands for the principle that an obligation to invest cannot be denied, or damages for its breach refused, simply because the United States is ordinarily not liable to pay interest on claims against it. The decision below clearly conflicts with this principle. It denies existence of the obligation to have made petitioners' funds productive, *a priori*, from the faulty premise that to award damages for its breach would be to award interest on a claim against the United States.

2. Everyone acknowledges that the funds covered into the IMPL account were petitioners' private property and that the government took possession of them strictly as trustee. *See, e.g.*, Govt. Br. 6 n.2. Petitioners were not consulted about and did not consent to the government's taking possession of the funds and depositing them in its Treasury. Nor, of course, were the funds subject to withdrawal on petitioners' orders.

While not disputing that its conduct must be judged by the standards applying to trustees, the government suggests that it was perfectly proper for it, in effect, to deposit its cestuis' funds in a "checking account" in its own bank. What it fails to grasp, given the magnitude of the balances it permitted to accumulate and lie fallow in the IMPL account, is that analogizing this account to a "checking account" is not exculpatory, but admissory, of liability. Indeed, for a trustee to deposit trust funds in a checking account in his own bank is a paradigm breach of trust. *E.g., Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971); and *see Menominee Tribe v. United States*, 101 Ct. Cl. 10, 20 (1944).

3. The government acknowledges that, after adoption of section 28 of the Act of May 25, 1918 (replaced by Act of June 24, 1938, which currently appears as 25 U.S.C. §162a), the Secretary of the Interior was empowered to make petitioners' IMPL funds productive by investment. It contends, nevertheless, because these acts are permissive in terms, that they do not obligate investment where such would be most beneficial to the Indians.

This contention points up the contemporary importance of the issue here.

In a variety of situations today, the government continues to take possession as trustee of funds belonging to Indian tribes and deposit them in accounts in its Treasury. Specifically, it still takes possession of pro-

ceeds derived by the tribes from sales of products, resources, and interests in lands of their several reservations and places them in IMPL accounts. Under the 1930 Act (25 U.S.C. §161b), it pays four percent interest on principal balances exceeding $500 in such accounts. Periodically, it credits the interest earned on these accounts to other accounts (interest accounts) on which it pays no interest. However, currently under the 1938 Act (25 U.S.C. §162a), the Secretary of the Interior is authorized to withdraw the funds in these accounts and invest them in a variety of Federal and Federal agency securities, and in certain private securities (*e.g.*, bank certificates of deposit).

For the last decade, investments authorized by 25 U.S.C. §162a have returned substantially more than four percent (and, appropos the interest accounts in the Treasury, substantially more than nothing). Recently, the Secretary has used this authority to invest virtually all Indian trust funds, including IMPL and interest on IMPL.

The government insists, however, that utilization of such investment authority to the benefit of the Indians is a matter of grace, and that it would breach no obligation owed if the Indians' funds were held in Treasury accounts producing substantially less, or nothing at all.

In a panel decision handed down four months before the decision in the instant cases, the court below held that the 1938 Act obligated the government to invest tribal trust funds, where such investments produce greater benefits for its cestui tribes. *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975).[1]

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[1] No distinction in principle can be drawn between the obligations of the 1918 and 1938 Acts.

[Footnote continued]

In the area of Indian property and affairs, the principle that duty (obligation) and power (authority) are concomitant is settled. Ninety years ago this Court iterated:

> . . . These Indian Tribes *are* the wards of the Nation. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by the court, whenever the question has arisen. (Emphasis original) *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

Where the Executive is authorized by Congress to make Indian trust funds productive, it is not only obligated to do so, but where it has been provided with several means, to employ that which is most productive. *See Menominee Tribe v. United States, supra*, at 21.

4. The government's suggestion that, if the 1841 Act required the *investment* of "all funds held in trust", there would have been no need, in subsequent treaties, to have made specific provision for the productivity of the proceeds, and, in subsequent statutes, for the *payment of interest* on Indian trust funds in the Treasury, is specious.

Treaties are bilateral instruments. It is not surprising that some of them concluded after 1841 contained specific provisions for the productivity of the pro-

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In *Cheyenne-Arapaho*, the court below held that the government had breached obligations it owed as trustee, among other ways, by leaving the tribes' funds in accounts in the Treasury returning no interest, or interest at rates below yields obtainable from securities in which it was authorized to invest, and by refusing, out of concern for the management of its own budget, to invest in certain authorized securities which, at the time, would have produced the best yields. 206 Ct. Cl. at ____, 512 F.2d at 1393-1394.

ceeds.[2] Custom, convenience of negotiation, and desire of the tribes to have the whole bargain set forth in the instrument would dictate the continued inclusion of such provisions, regardless that in their absence the 1841 Act would have applied.[3]

Outside investment and the payment of interest on trust accounts in the Treasury were always recognized as separate and distinct means of providing for the productivity of trust funds.[4] The first statute of general application providing for the payment of interest on certain kinds of Indian trust funds in the Treasury was the Act of April 1, 1880, 21 Stat. 70 (25 U.S.C. §161). It was intended by Congress to provide a means of productivity alternative to that provided by the 1841 Act.[5]

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[2]Some post-1841 treaties, as some earlier ones, provided for productivity of the proceeds by payment of interest, rather than by investment. *See, e.g.*, Treaties of February 28, 1831, July 20, 1831 and August 8, 1831 with the Seneca Tribe of Indians, 7 Stat. 348, 351, 355; Treaty of May 6, 1854 with the Delaware Tribe of Indians, 10 Stat. 1050; Treaty of May 17, 1854 with the Iowa Tribe of Indians, 10 Stat. 1070; Treaty of May 30, 1854 with the Kaskaskias, Peorias, Weas, etc., 10 Stat. 1084. The payment of interest, of course, is not authorized by the 1841 Act.

[3]The Act expressly stipulates that it applies only "when not otherwise required by treaty."

[4]The subject of how to deal with Indian trust funds engaged the attention of Congress for three years prior to adoption of the 1841 Act. *See, e.g.*, S. Jour., 25th Cong., 2d Sess. 331 (1838); S. Doc. No. 426, 25th Cong., 2d Sess. (1839); H.R. Rep. No. 892, 25th Cong., 2d Sess. (1838); H.R. Doc. No. 145, 26th Cong., 1st Sess. (1840); S. Doc. No. 116, 27th Cong., 1st Sess. (1841). Some believed then that their productivity should be provided for by placing them in accounts in the Treasury at interest. *See, e.g.*, 10 Cong. Globe, 27th Cong., 1st Sess. 441 (1841) (remarks of Senator Clay).

[5]*See, e.g.*, 40 Cong. Rec. 212-15, 719-20, 1514 (1880); S. Rep. No. 186, 46th Cong., 2d Sess. (1880).

[Footnote continued]

After 1841, in 1918 and 1938, Congress expanded the kinds of investments the Secretary was authorized to make of Indian trust funds to procure their productivity. But, from 1841 on, the statutes directing or authorizing the investment of such funds extended to all classes of them.

After 1880, *e.g.*, in 1929 and 1930, Congress expanded the classes of Indian trust funds that, in lieu of investing, the Secretary might place in interest-bearing accounts in the Treasury. But the statutes authorizing the payment of interest never did, and do not now, embrace all classes of such funds.[6]

To suggest, as the government does, that, had the 1841 Act been applicable to all Indian trust funds, the later acts providing for the *payment of interest* on trust funds in the Treasury would have been unnecessary, is to continue the confusion of apples and oranges that has characterized the government's position throughout this case.

Authority to make trust funds productive by outside investment is quite a different thing from authority to pay interest on funds in the Treasury. This case concerns only the former and does not involve the latter. The failure of the government and the court below to recognize the distinction is why petitioners are here.

The 1880 Act authorizes the Secretary of the Interior to deposit covered trust funds in interest-bearing accounts in the Treasury "whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments."

[6]*E.g.*, as noted above, there is no statute authorizing the payment of interest on trust funds in the Treasury consisting of interest previously earned on principal trust accounts. Such funds may be made productive by investment, and virtually all presently are, under the 1938 Act.

Finally, if the government, when it unilaterally took possession of petitioners' funds, did not become subject to the obligation to make them productive for petitioners' benefit, then it cannot have been acting in the capacity of trustee. It cannot, at once, style itself a trustee and renounce the obligations of the office. Neither the government nor the court below has attempted to explain how, conformably to the Constitution, the government can have taken possession of petitioners' private funds without assuming the obligation, as trustee, to make them productive, or, as sovereign, to compensate for their use.

The notion that the no-interest rule somehow exempts the government as trustee of Indian funds from the obligation to make them productive, if allowed to be ensconced in the law by the decision below, will not only inflict great injustice on petitioners and the other Indian tribes having justifiable claims for past breaches of the obligation, but will encourage such breaches in the future. This notion is not only plainly wrong, but plainly pernicious. A writ of certiorari should issue to the Court of Claims so that it can be "extirpated and put to the torch."

Respectfully submitted,

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